

## PUBLIC CITIZEN LITIGATION GROUP

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August 15, 2016

Department of Health and Human Services (HHS)  
Freedom of Information Officer  
Hubert H. Humphrey Building, room 729H  
200 Independence Avenue, SW  
Washington, DC 20201

RE: RIN 0991-AC04, Docket ID HHS-OS-2016-0010-001

Dear FOIA Officer:

Public Citizen writes to comment on the Department of Health and Human Services' (HHS) proposed revision of its regulations implementing the Freedom of Information Act, 81 Fed. Reg. 39003 (June 15, 2016).

Public Citizen is a nonprofit consumer advocacy organization founded in 1971. On behalf of its nationwide membership, Public Citizen advocates before the courts, legislatures, and administrative agencies for safer consumer products, corporate accountability, and openness in government decision making. Since its founding, Public Citizen has regularly used the Freedom of Information Act (FOIA) to request records related to its advocacy efforts and has represented FOIA requesters in hundreds of lawsuits challenging government secrecy.

Public Citizen has a long-standing commitment to ensuring the public's access to government records under FOIA and commends HHS for revising its FOIA regulations to incorporate changes made to FOIA by the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act) and the Electronic FOIA Act of 1996 (E-FOIA Act). However, some aspects of the agency's proposed rule violate FOIA or place unnecessary burdens on FOIA requesters. These comments address six topics: 1) the time frame for requesters to respond to communications from the agency; 2) when the twenty-working-day statutory time limit begins to run; 3) the definition of "confidential" in the regulations' discussion of Exemption 4; 4) the time for submitters of information designated confidential to respond to predisclosure notifications; 5) what requesters must show to be eligible for a fee waiver; and 6) changes made by the FOIA Improvement Act of 2016.

### **I. The Ten-Day Time Limit for Requesters To Respond to Communications by the Agency Is Too Short.**

At multiple points in the proposed regulations, HHS states that it will provide requesters with ten working days to respond to questions or other communications and that it reserves the right to administratively close the requester's FOIA request if it does not receive a response within that time frame. *See* § 5.25(b)(2) (discussing the time frame for a requester to respond to a

request to perfect a request); § 5.25(c) (discussing the time frame for a requester to respond to a request for additional information or clarification about the specifics of the request or fee assessment); § 5.41(b) (discussing the time frame for making an advance payment); § 5.41(e) (discussing the time frame for a requester to respond to a communication by the agency in the course of negotiating fees).

Particularly given that requesters often have no expertise in FOIA, the ten-day time limit for requesters to respond to communications is too short. A requester may be away and unavailable to respond during those two weeks or may need time to research FOIA before responding. Moreover, if the agency waits months or years to communicate with the requester, she may need time to review the request and determine whether she is still interested in the requested records.

HHS should give requesters at least twenty working days—the same amount of time allotted agencies to respond to requests—to respond to questions or communications from the agency. If an agency takes more than twenty working days from the date of the request to initiate a communication with the requester, the requester should receive that same amount of time to respond to the agency. Requesters should not wait months to hear from the agency and then have their request closed if they fail to respond to a question within a matter of days.

In addition to not closing requests if the requester does not respond to a communication within ten working days, the agency should not close requests if its correspondence is returned as undeliverable. *See* §§ 5.25(b)(2) & (c). Instead, the agency should be required to make at least three good-faith efforts to contact the requester by various forms of communication (mail, e-mail, telephone). *Cf.* 5 U.S.C. § 552(a)(4)(A)(viii)(II)(bb).

## **II. FOIA’s Twenty-Day Time Limit Begins To Run No Later Than Ten Days After the FOIA Request Is First Received by Any Component of the Agency Designated To Receive Requests.**

Section 5.25(b)(1)(i) states that the twenty-working-day statutory response period begins to run when, among other things, the “request is received by the responsible FOIA office.” As the regulations recognize in § 5.23(b), however, the twenty working day period begins “not later than ten days after the request is first received” by *any* component of the agency designated to receive requests. 5 U.S.C. § 552(a)(6)(A). Section 5.25(b)(1)(i) should be amended to explain that the twenty-working-day statutory response time begins to run when the request is received by the responsible FOIA office, but not later than ten days after it is received by any component designated to receive requests.

## **III. The Proposed Regulations’ Definition of Confidential Is Too Broad.**

The proposed regulations state that information is considered “confidential” for the purposes of Exemption 4 if it meets one of five tests, including if disclosure “would impair other government interests, such as program effectiveness and compliance” and if disclosure “would impair other private interests, such as an interest in controlling availability of intrinsically valuable records, which are sold in the market by their owner.” §§ 5.31(d)(2)(iv)(D) & (E). These tests are too broad: a record is not confidential under Exemption 4 whenever the agency

believes its disclosure would impair any government or private interest. As the Supreme Court has explained, permitting an agency to withhold records whenever it decides “that disclosure would not promote the ‘efficiency’ of its operations or otherwise would not be in the ‘public interest’” would “run counter to Congress’ repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague ‘public interest’ standard.” *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979). The agency should delete §§ 5.31(d)(2)(iv)(D) & (E) from its definition of “confidential.”

#### **IV. FOIA’s Time Limits Must Be Taken Into Account in Determining How Much Time Submitters Should Be Allotted To Respond To Predisclosure Notifications.**

Section 5.31(d)(4)(ii) states that submitters of information designated confidential will have ten working days from the date the agency provides them with a predisclosure notice to object to the disclosure and that HHS’s FOIA offices may extend that time period. However, FOIA provides specific time limits within which agencies must respond to FOIA requests. Accordingly, HHS only has limited ability to extend the time for submitters to respond to predisclosure notices. The regulations should specify that the agency will expeditiously provide predisclosure notification and should make clear that the amount of time provided to a submitter to respond to a predisclosure notice may not exceed the remaining amount of time in which the agency is required by law to process the request.

#### **V. Requesters Are Not Required To Be Able To Disseminate Information to a Broad Spectrum of the Public To Receive a Fee Waiver.**

Section 5.45(b)(5) states that, to be eligible for a fee waiver, a requester must explain how it “intend[s] to disseminate the requested information to a broad spectrum of the public.” The D.C. Circuit has specifically held, however, that “proof of the ability to disseminate the released information to a broad cross-section of the public is not required.” *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1116 (D.C. Cir. 2015) (quoting *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004)); *see also id.* (“Nor does the statute require a requester to show an ability to convey the information to a ‘broad segment’ of the public or to a ‘wide audience.’”). Rather, “the relevant inquiry ... is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Id.* (quoting *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)).

At the least, § 5.45(b)(5) should be amended to make clear that the requester does not need to show an ability to disseminate information to a broad spectrum of the public. However, it would be best to delete § 5.45(b)(5) altogether because it is duplicative of § 5.45(b)(4), which already requires the requester to explain how he intends to effectively convey information to the public. Likewise, § 5.45(b)(3) should be deleted because it is duplicative of §§ 5.45(b)(1), (2), (4), & (6): if the requester has explained how the information “pertain[s] to the operations and activities” of the government, (b)(1), how it will “reveal meaningful information,” (b)(2), that he has the ability and intent to disseminate, (b)(4), and that disclosure “will lead to a significantly greater understanding of the Government by the public,” (b)(6), he has already explained the factor in (b)(3) of how disclosure to him will advance public understanding of the issue. There is

no need for a single clause—“because it is likely to contribute significantly to public understanding of the operations or activities of the government,” 5 U.S.C. § 552(a)(4)(A)(iii)—to be broken down into six separate factors, and requesters should not have to repeat the same information numerous times to be eligible for a fee waiver.

## **VI. The Proposed Regulations Should Incorporate the Reforms Made by the FOIA Improvement Act of 2016.**

On June 30, 2016, President Obama signed the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, into law. That Act has rendered various of HHS’s proposed regulations either incomplete or contrary to FOIA. For example:

- Section 5.52 of the proposed regulations states that “All appeals must be in writing and received by HHS within 45 calendar days from the date of our final determination letter.” However, as amended by the FOIA Improvement Act, FOIA provides that the time to appeal must be “not less than 90 days after the date of [an] adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).
- Section 5.44(d) of the proposed regulations states that HHS will not assess search fees (or, for certain requesters, duplication fees) if the agency fails to comply with applicable time limits “unless unusual or exceptional circumstances apply.” The FOIA Improvement Act makes clear, however, that it is not enough for unusual circumstances to apply; the agency must also “provide[] a timely written notice to the requester” setting forth the unusual circumstances and meet other requirements that depend on the number of pages necessary to respond to the request. 5 U.S.C. § 552(a)(4)(A)(viii)(II).
- Section 5.2 of the proposed regulations discusses the presumption of openness, but does not explain that under FOIA, as amended by the FOIA Improvement Act, the agency may only withhold information if it “reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i).
- Section 5.31(e)(1) of the proposed regulations discusses the deliberative process privilege, but does not mention the limitation on the privilege, added by the FOIA Improvement Act, that the “privilege shall not apply to records created 25 years or more before the date on which the records were requested.” 5 U.S.C. § 552(b)(5).

The agency should amend the proposed regulations to account for these and other reforms made by the FOIA Improvement Act.

Thank you for considering these comments. Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Adina H. Rosenbaum". The signature is fluid and cursive, with a prominent initial "A" and a long, sweeping underline.

Adina H. Rosenbaum  
Attorney, Public Citizen